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Issue Date: 02 May 2006

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In the Matter of

ANTHONY MATHIS
Claimant

v.

SOUTHERN MAINTENANCE &
REPAIR/RELIANCE NATIONAL
INDEMNITY CORP.
Employer/Carrier

And

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Case No. 2005 LHC 00320
OWCP No. 6-183353

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Decision and Order

This matter involves a claim for benefits filed under the Longshore Act by Anthony Mathis of Jacksonville, Florida. Mathis, while working as a chassis mechanic, claims he sustained cervical and upper extremities injuries at work on July 26, 2000, Tr. 35-36; Ex 8. Apparently, Claimant was asymptomatic until July 26, 2000, Tr. 40-41, when he alleges that he first experienced numbness and tingling in his hands and lost the ability to grasp his tools. Tr. 35. He was diagnosed with bilateral carpel tunnel syndrome, which Claimant alleges was a misdiagnosis of his condition. Tr. 37. Claimant contends, alternatively, that his condition was caused by a prior injury to his neck which was aggravated by his work activities, Tr. 39, or by a degenerative cervical condition that was aggravated by his work activities. In this proceeding, he claims that he has not reached

maximum medical improvement for his cervical condition, can not return to his job, and, accordingly he seeks an award for temporary total disability. Tr. 45. Claimant asserts that his average weekly wage is $1,137.71. Tr. 46; CX 2, LS-206 (AWW-$1128.09), while Employer contends that Claimant's average weekly wage is $890.14. Tr. 53-54.

Addressing Claimant's injuries, Employer responds that Mathis initially reported that he suffered a traumatic injury on July 26, 2000, when he struck his right wrist on a chassis. Tr.56. Compensation was paid voluntarily for temporary total disability through September 21, 2000, and for brief periods, following Claimant's return to full duty on September 22, 2000. Tr. 56. Subsequently, Claimant was placed at maximum medical improvement (MMI), and was paid for a 4% impairment in accordance with the schedule set forth in Section 8(c)(1) of the Act for an injury to the upper extremity.[1] Employer, thus, accepted responsibility for the carpel tunnel syndrome, Tr. 58, but it disputes that Claimant's alleged neck condition is related to any employment condition or that any nexus exists between Claimant's neck problem and the July 26, 2000 accident. Employer further contends that any claim related to any neck complaint is time barred under Sections 12 and 13 of the Act. Tr. 59-60. Finally, Employer argues that Claimant has reached MMI for the injuries to his upper extremities and has a demonstrable residual wage earning capacity that renders compensation based on the schedule appropriate. Tr. 62.

Findings of Fact

The record shows that Mathis was employed by Southern Maintenance and Repair as a chassis mechanic repairing containers and chassis, including the frames, goose necks, brakes, axles, bolsters, rails, flooring and doors. Tr. 73. The job entailed welding and the use of large and small hand and air tools which vibrated in use. Tr. 74. A job analysis provided by Employer shows that a mechanic uses both hands to operate machinery and tools, that the work "is physically demanding," and involves lifting and carrying, pushing and pulling heavy objects "in excess of 50 pounds" on an occasional basis throughout the work day. Ex 12.

At the hearing, Claimant denied that he sustained a specific trauma on July 26, 2000. Tr.65-67. He testified that he simply reported that his "arms and hands are hurting," Tr. 67, and that Employer filled out the form stating that he struck his

[1] *See*, MMI date discussed at Pg. 29-30 *supra*.

wrist. Tr. 66. Claimant testified that he was initially evaluated and treated for his injuries by Dr. DePadua. He reported pain in both upper extremities from the forearms to his hands, Tr. 68, and, after a few visits with Dr. DePadua, Claimant testified that he was referred to Dr. Kitay with complaints about pain in the upper extremities, radiating, according to Claimant, into his shoulders. Tr. 69. He did not, at that time, complain about neck pain. Tr. 69.

Mathis testified that Dr. Kitay treated him with shots in both wrists which proved ineffective, and eventually he underwent surgery on his left wrist. Tr. 69. He reported that the surgery and medication helped, but the pain never completely subsided. Tr. 70, 75-76. Following the surgery and a period of recovery, Mathis was released to work; but after two days on the job, his hands and wrists swelled, and he was sent home. Tr. 76. Thereafter, his hand discomfort continued and he experienced periodic headaches. Tr. 77. He did not return to work after September 3, 2001. Tr. 78.

Mathis testified that he had headaches prior to July, 2000, and his personal physician advised him**:** "it was stress and work-related headaches, but my physical was fine." Tr. 70-71. Addressing the alleged injury to his neck, Claimant testified that he was struck on the shoulders and neck by a crossbar at work in 1998 while repairing the floor of a container. Tr. 71, 91. He testified that he was using a power jack to apply pressure from the floor to the ceiling of a container when the jack lost prime and toppled over, "hitting [him] across the shoulders" as he was stooping to repair the floor. Tr. 71; Tr. 150-57. The bar that allegedly hit him was solid steel, about ten to twelve feet long and weighed from 90 to 110 pounds. Tr. 72; Tr. 151-53. After the incident, Claimant rested a minute or two and went back to work. Tr. 91. He testified that he reported the incident to his supervisor but did not want to see a doctor. He testified that he "shook it off" and continued working on a regular basis, continuously until July 26, 2000. Tr. 72-73, 91. No written report or claim involving the incident was filed. Tr. 92. Claimant believes that co-workers witnessed the incident, Tr. 158, but none were called to testify in this proceeding.

Claimant acknowledged that during his visits with Dr. DePadua, he did not mention neck pain. He saw Dr. Kitay on August 24, 2000, for bilateral pain in his arms and hands, and alleges he mentioned, in response to a question by Dr. Kitay, that his shoulders ached. Tr. 93. From September 21, 2000, through May 15, 2001, Claimant visited Dr. Kitay 8 times and did not complain of any neck problem or neck injury on any of those occasions. Tr. 94. During a nerve conduction study on May 30, 2001, Claimant denied any "history" of upper back or neck pain. Tr. 98-99. He acknowledged that the first time he complained of neck pain was after the

physical exertion he expended during a functional capacity evaluation (FCE) on October 22, 2001, following his carpel tunnel surgery. Tr. 94-97. Thereafter, however, he did not mention neck pain during an office visit with Dr. Kitay on November 9, 2001. Tr.100-101. He first mentioned his neck pain to Dr. Kitay on May 9, 2002, after his sixteenth visit. Tr. 97-98.[2] Claimant contends that he went to his personal physician, Dr. Sykes, for the neck pain he experienced following the FCE, and Dr. Sykes sent him for an x-ray. Tr. 102.

The record shows that Mathis asked Dr. Kitay to refer him to a neck specialist after he learned that Dr. Kitay had referred one of his acquaintances to a neck specialist. Dr. Kitay provided him with two referrals, but, unlike Claimant's acquaintance, Dr. Kitay could not link Claimant's hand problems to his neck complaint because he saw no history to justify a connection. Tr. 105-06, 108; Tr. 159-61.

Claimant has no restriction on his driver's license, Tr. 137, and can sit, stand, stoop, walk, climb, reach and lift up to 25 pounds, and can grab objects up to five minutes. Tr. 139-40. Dr. Kitay approved him to return to work with restrictions. Tr. 136.

Mathis first received pain management treatment for his neck on referral from Dr. Sykes in August or September of 2002. Tr. 81, 110-11. He reported to Dr. Florete's assistant, Loubens Jean-Louis, that his neck pain increased after a functional capacity evaluation. Tr. 114, 117. Claimant denied that he told Mr. Jean-Louis about the 1998 crossbar incident or that he received treatment in the emergency room for that accident. Tr. 114. He did tell Mr. Jean-Louis that he saw Dr. Brooks in 1999 and had emergency room visits for headaches. Tr. 115. At the time, Claimant thought the headaches were stress-related "from the job and all." Tr. 116.[3] He told Mr. Jean-Louis that his headaches preceded his hand symptoms, and that his neck pain followed the FCE. Tr. 116-118.

Claimant visited Dr. Hudson and claims Dr. Hudson asked if he had ever had a neck injury. Claimant testified that he described the 1998 crossbar incident to Dr. Hudson in response to Dr. Hudson's question, Tr. 78, and it was Dr. Hudson who advised him that the repetitive use of tools and vibration "made the neck injury worse." Tr.78. Claimant testified that was first time he was given any

[2] There is also testimony that Claimant first reported neck pain to Dr. Kitay on February 28, 2002, however, Dr. Kitay's February 28, 2002, office notes do not mention neck pain complaints. Tr. 103-04.

[3] At his deposition, Claimant testified that he saw Dr. Brooks in 1999 for headaches, EX 28 at Tr. 31, and Dr. Brooks attributed his headache pain to "work-related stress and things like that." Tr. 38-39.

information suggesting that the headaches and neck complaints were work-related, Tr. 78, but as previously noted, Dr. Brooks advised him that the headaches were job-related. He denies that he told Dr. Hudson his neck pain started after another on-the-job injury. Tr. 129-30. He claims he told Dr. Hudson his neck pain started after the FCE, Tr. 132, and that he told Dr. Hudson that he did not complain about neck pain to Dr. Kitay. Tr. 132.

Claimant testified he is unable to return to his previous employment as a chassis mechanic. Tr.79. He acknowledged that he received the labor market survey reports conducted by Employer and claims he inquired about each of the jobs listed in the surveys, and interviewed with several employers but was not offered a position. Tr. 79, 86-87, 89. Claimant testified that he called some employers and visited others. Tr. 143-44. Some employers took applications, others advised that the jobs were filled. Tr. 144-49. Cx 18. At deposition, Claimant testified that other than the jobs identified in the labor market survey, he had not looked for work. Tr. 122. Subsequent to his deposition, he did look for work two or three times. Tr. 141. He visited the unemployment office and applied with Worksource, which provided him with a job description for a position which Claimant believed exceeded his physical restrictions applying bullet proof shielding on military vehicles. Tr. 80; Tr. 85-86; Cx 18.

Although Mr. Loubens, the physician's assistance, opined that Mathis can not work, Tr. 123; no physician concluded that he was unable to work, Tr. 123-24; and Claimant testified that he does believe there are jobs he can perform. Tr. 150.

Pre-Injury Earnings

Employer asserts that Claimant's gross wages during the period July 26, 1999 to July 26, 2000 totaled $48,137.50. Claimant states that his gross wages during this period totaled $49,193.50. Claimant's ILA wage summary indicates both totals are incorrect. Claimant's total includes earnings through July 30, 2000, while Employer's total includes earnings through July 23, 2000. The record shows, however, that Claimant's TTD benefits commenced on July 30, 2000, and for the week ending Sunday, July 30, 2000, his "last day worked" was Saturday, July 29, 2000. He, therefore, worked three days after the July 26, 2000 date of injury, and in his last week of work earned $1,056.00 for 32 hours of straight time and 8 hours of overtime. EX 32. Documents in evidence also show a container royalty of $6,411.51 and vacation and holiday pay amounting to $4,784.00. Cx 13; Ex 32. *See also*, EX 22 (SSA earnings) and EX 23 (Tax returns).

Vocational Evidence

Rick Robinson, a vocational rehabilitation counselor, Tr. 161, interviewed Claimant on December 12, 2001. Tr. 161-63; EX 20. The interview report indicates that Claimant injured his wrist on a container. Tr. 163. The interview did not include vocational testing. Tr. 177; 208. At the time, Claimant was restricted to lifting no more than 50 pounds or lifting 25 pounds frequently, i.e, 34% to 66% of the workday. Tr. 167. CX 9; Ex 20.

Robinson's interview report dated December 12, 2001, noted Claimant's age, 39; his education, including vocational training at the junior college level; and employment history, including electrician apprentice, jet engine mechanic, truck driver, and chassis mechanic. Robinson also noted Claimant's injury history, medical history, including the medications prescribed at that time, and physical restrictions over time which eventually included frequent lifting of 15 pounds and a 50 pound maximum, with the capacity to perform medium duty work, 8-hours. The report noted that Dr. Greider had placed Claimant's carpel tunnel at maximum medical improvement with a 3% impairment on the left side.

Robinson completed a labor market survey on February 5, 2002, and sent six jobs to Dr. Kitay for his approval. Tr. 163-64. On February 15, 2002, Dr. Kitay approved several jobs, including a chassis mechanic position with Transportation Equipment Specialists at $12.00 to $13.00 per hour, a janitor job with Hartland at $6.25 per hour, a lot attendant job with Super Saver Parking at $6.50, a courier position with Don Taylor Associates at $7.00, a gate checker/trailer inspector with Parsec at $6.00, and shipping and receiving clerk at Benner China and Glass. Tr. 164-67; Tr. 178-81. With respect to the chassis mechanic job, Dr. Kitay indicated that the lifting requirement should be "infrequent" but Robinson did not check back with the employer to determine the lifting requirement. Tr. 175-76. With respect to the Benner job, lifting frequency again was an issue that Robinson did not resolve. Tr. 183. The record shows that the Parsec job was available on January 8, 2002, not 2001, and the Benner job was available on January 17, 2002. Tr. 182; EX 20.

Robinson conducted a second labor market survey on August 4, 2004, EX 20 ; Tr. 168, and prepared a Vocational Interview Addendum on August 16, 2004. This survey was retroactive. Tr. 181. He submitted the jobs to both Dr. Kitay and Dr. Hudson. Tr. 169-170, Ex 20. Dr. Kitay, on October 18, 2004, approved eleven jobs on the second survey. Tr. 186. These included, checking in cars at Avis, available March 28, 2003, at $7.20 per hour; packing fishing lures at C&H Lures

available January 24, 2003 at $6.00 to $6.50 per hour; sewing machine operator at Creative Images, available September 10, 2002 at $7.00 per hour; shop clerk at Cypress Truck Lines, available June 27, 2002 at $9.00 per hour; flagman at Hubbard Construction, available February 6, 2002 at $8.00 per hour; shipping an receiving clerk at Benner China available January 17, 2002 at $8-$11.00 per hour; gate inspector at Parsec available January 8, 2002 at $6.00 per hour; dishwasher at Seminole Club available November 20, 2001 at $5.15 per hour; parts runner at Snyder Air available October 9, 2001 at $8.00 per hour; straw machine operator at Unisource, available August 1, 2001 at $9.23 per hour; dispatcher at Jaguar Tech, available at July 13, 2001 at $8.00 per hour; dispatcher at Econo-Rooter, available May 14, 2001 at $7.00 per hour; and assembler at Mercury Luggage, available February 28, 2001 at $6.25 per hour. CX 9.

Dr. Hudson reviewed the nine jobs listed on the first labor market survey. He disapproved the chassis mechanic job at Transportation Equipment, Hudson Depo at 26; He approved the janitor job at Heartland provided Claimant did not have to use the mop and broom continuously. Hudson Depo at 27-28. He approved the jobs at Super Saver Parking as a lot attendant, and as a courier at Taylor & Associates. Hudson Depo at 28. He approved the gate checker job at Parsec with a reaching limitation. Hudson Depo at 29-30. He disapproved the job at Benner China and Glass and the job as painter. Hudson Depo at 30-31. Dr. Hudson acknowledged that Dr. Kitay was more familiar with Claimant's carpel tunnel syndrome and he deferred to Dr. Kitay's evaluation of Claimant's capabilities and physical limitations due to carpel tunnel syndrome. Hudson Depo at 36-37.

The jobs Dr. Hudson approved on the second survey which were also approved by Dr. Kitay included; the jobs at Avis, C&H Lures, Cypress Truck Lines, Hubbard Construction, Parsec, Seminole Club, Snyder Air, Unisource, Jaguar Tech, and Econo-Rooter. Tr. 186; Ex 20. While Dr. Hudson did not specifically assess Claimant's work restrictions, Tr. 171, he nevertheless, disapproved the jobs at American Technical, Desktop Digital, and Pilot Pen. Tr. 190,192-93. The debris blower job was clarified, and as clarified, exceeded Claimant's lifting restrictions. Tr. 192.

The record shows that Robinson rejected as unsuitable the Wal-Mart greeter jobs, Tr. 197, and jobs requiring computer skills if the employer "preferred" someone who had the skills. Tr. 197-98. He did not discount computer jobs if the employer was willing to train the applicant because he believed Claimant had sufficient skill and capacity to learn to input data into a computer. Tr. 205-06. Robinson further confirmed that the jobs that required computer use were

submitted to Dr. Kitay for carpel tunnel evaluation. Tr. 207. He also noted that the job at C&H Lures required manual dexterity and Dr. Kitay was advised of that, Tr. 202-03, but he was not advised of the "extent of dexterity" needed. Tr. 203.

Robinson did not know whether Claimant could drive a vehicle with a stick shift, but he did not consider unsuitable jobs that entailed driving, such as dental lab driver, Tr. 198-99, or rover at Avis, Tr. 200-01; because the vehicle or vehicles may have had manual transmissions. Tr. 202. He did note that the job with Florida DOT on FL/Georgia line may be too distant. Tr. 199.

Robinson testified that the suitable jobs on the first survey were available at the time they were identified. Tr. 172. The jobs identified on the second labor market survey were available when they were identified and may have been available before that. Tr. 173. The labor market surveys were sent to Claimant's counsel, but Robinson did not check with the employers to determine whether Claimant contacted them. Tr. 173-74; 184; 200. Claimant testified that he contacted all of the employers on the second survey. Tr. 200. Cx 18. Robinson confirmed that the job at Cypruss was available September 13, 2004, but he could not confirm whether it was available on June 27, 2002, Tr. 203; the job at Historic Seminole Club was available November 20, 2001, Tr. 204-05; and the job at Unisource was available August 1, 2001, but Robinson acknowledged that the restrictions may have changed. Tr. 206. Although Dr. Florete on January 21, 2005, reported that some of Claimant's medications are opiates and can cause drowsiness, CX 17, the surveys were not provided to Dr. Florete for his evaluation. Tr. 185. No physician, however, concluded that Claimant can not work, Tr. 172, and Claimant has no restriction on his driver's license.

Medical Evidence

Following the injury on July 26, 2000, Claimant went to Dr. DePadua. Dr. DePadua initially treated him conservatively for bilateral tendonitis of the right and left wrist due to the July 26, 2000 injury. By history reportedly provided by Claimant, Dr. DePadua noted that the injury occurred when Claimant hit his left wrist while repairing a chassis. CL. Med. CX 1.[4] Dr. DePadua referred Claimant for therapy with Heartland Rehabilitation Services. CL. Med. CX 2; EX 31.

[4] Claimant submitted to 2 volumes of exhibits, both of which contained documents marked as exhibit 1 and numbered sequentially. To distinguish the numbered exhibits in each volume, Claimant's volume containing medical exhibits will be cited as CL. Med CX …, while the other will be cited CX. Employer's exhibits are cited EX.

Claimant visited Dr. Kitay on August 24, 2000. CL. Med. CX 3; EX 15. Dr. Kitay took a history and reported that Claimant told him he had no "past medical history." Dr. Kitay then reviewed x-rays and examined Claimant. He diagnosed bilateral flexor tenosynovitis, treated him with injections, Ex 15, and released Claimant to return to work with restrictions. On September 21, 2000, he indicated the Claimant had reached maximum medical improvement and planned to release him for full duty with 0% permanent partial impairment. Ex 15.

Claimant returned to work, but reported back to Dr. Kitay on November 3, 2000, with increased pain symptoms and numbness, and Dr. Kitay suspected bilateral carpel tunnel syndrome. A November 2, 2000 nerve conduction velocity test administered by Dr. Snyder confirmed mild carpel tunnel bilaterally. Ex 15.

In late November, 2000, Claimant went to the emergency room at St. Vincent's Hospital complaining of headaches. The "progress" report dated November 29, 2000, noted that Claimant had gone to the hospital: "for headaches." The report also noted: "As previously reported has had these since the age of 8. Occur regularly every month." Cx 6.

On December 8, 2000, Dr. Kitay released Claimant to return to modified duty with restrictions. CL. Med. CX 6. Three days later, a December 11, 2000, brain scan at St. Vincent Medical Center was interpreted by Dr. Donohue as "unremarkable." CL. Med. CX 6; EX 21.

Dr. Kitay advised Claimant, on February 6, 2001, that "he did not have classis symptoms of carpel tunnel, but that a carpel tunnel release may be beneficial for him," and he authorized Claimant to return to full duty. CL. Med CX 3; EX 15

On March 27, 2001, Dr. Kitay revisited the question of Claimant's progress and determined that he had reached maximum medical improvement with a 4% whole body impairment rating. Ex 15. He released Claimant for "full duty" which, on May 15, 2001, he reduced to modified duty with lifting restrictions, after Claimant reported palm to forearm pain. Ex 15. On May 30, 2001, Dr. Kitay referred Claimant to Dr. Frank Collier for a nerve conduction study which showed, *inter alia*, persistent mild bilateral carpel tunnel syndrome. A history taken by Dr. Collier who performed the NCV dated May 30, 2001 states: "He denies any upper back or neck pain." Ex 15.

Dr. Kitay continued to treat Claimant conservatively. On June 7, 2001, he noted that a May 30, 2001 nerve conduction report showed mild bilateral carpel tunnel. Claimant at that time reported pain "Referred to the elbow bilaterally." Ex 15. On June 27, 2001, Dr. Kitay performed a left carpel tunnel release. Following a period of recovery, Dr. Kitay, on July 10, 2001, again released Claimant to return to modified duty with restrictions. By September, 2001, however, Claimant was still experiencing discomfort and was still limited to lifting 15 pounds. On September 7, 2001, Dr. Kitay reported that he had difficulty "categorizing" Claimant's pain, and was unsure whether it was related to carpel tunnel. Ex 15.

On October 2, 2001, Dr. Kitay referred Claimant for a functional capacity evaluation (FCE) which was conducted on October 22, 2001. CL. Med. CX 4; Ex 19.

Dr. Greider performed an independent medical examination on October 15, 2001. In his report of the same date, he indicated that he obtained a symptom history which included Claimant's report that he experienced "longstanding pain in his hands," but no "previous injury to the area…." CL. Med. CX 7; Ex 14.. Dr. Greider diagnosed bilateral carpel tunnel and placed Claimant at MMI with a 3% whole body impairment rating. CL. Med. CX 7; Ex 14

On November 9, 2001, Dr. Kitay released Claimant from his care, this time with a 3% whole person impairment, and released him for "medium labor" work including lifting up to 50 pounds maximum and frequent lifting and carrying up to 25 pounds. CL Med CX 3.

On November 27, 2001, Claimant appeared in the emergency room at St. Vincent's Medical Center complaining of neck pain. CL. Med Cx 6. A diagnostic cervical x-ray dated November 27, 2001, read by Dr. Peter Bream revealed mild hypertrophic spondylosis and mild deformity at C5 "suggesting old injury." Ex 21.

An MRI on January 21, 2002, of the cervical spine read by Dr. Marc Freeman revealed some "mild motion and body habitus limitations in the upper thoracic region" with no definite encroachment or persistent abnormality and: "No definite abnormality." CL. Med. CX 6. Ex 21.

On February 28, 2002, Claimant returned to Dr. Kitay reporting that he was unemployed and experiencing a burning pain in the wrist and numbness, and Dr. Kitay diagnosed "possible" right carpel tunnel which was confirmed by a nerve conduction study administered by Dr. Hartwig and reaffirmed by Dr. Sykes on

April 11, 2002. April 12, 2002, Dr. Kitay released Claimant for modified work with 50 pound maximum, 25 pound carrying restrictions. Ex 15.

After reporting in April that his symptoms had subsided, Claimant returned to Dr. Kitay on May 9, 2002, requesting that Dr. Kitay refer him to a neck specialist. Dr. Kitay reported that "I told him it is difficult for me to relate his neck to his work as I do not recall a specific injury in this area." He did, however, provide Claimant with the names of two neck specialists. CL. Med. CX 3; Ex 15.

On September 30, 2002, Claimant visited the Institute of Pain Management on referral by Dr. Sykes. He was seen by Loubens Jean-Louis, an assistant to Dr. Florete. Claimant provided a detailed history of his medical and symptom history, and was examined by Mr. Jean-Louis. CL. Med. CX 10; EX 30 Marginal notes on a Pain Management Center questionnaire indicate that Claimant reported experiencing pain in his wrists and pain in his neck, shoulders, and arms which began in 2001. A further notation indicates that Claimant reported that he had an injury at work in 1999 when a steel bar hit his back and shoulder. CL. Med. CX 10 (Questionaire pg. 2.). In his narrative report, Mr. Jean-Louis states, *inter alia*, that: "In 1999, while at work, a metal steel rod fell on his neck, subsequently hitting his back and shoulders. He stated that he went to an emergency room and received treatment at that time, and had a cervical strain to his neck. He stated that his current pain started back in March of 2000. He started having terrible headaches. At that time, he went to Dr. Brooks, who stated his headache was occupational related, probably secondary to the metal rod that fell on his neck in 1999." CL. Med. CX 10.

A February 28, 2002, note by Dr. Kitay indicates that Claimant was seeing a neck specialist and that he was released Claimant MMI with a 3% as of Nov. 9, 2001, for carpel tunnel only. Dr. Kitay approved modified work with 50 pound maximum, 25 pound carrying restrictions. Ex 15.

On October 1, 2002, a cervical MRI interpreted by Dr. Elias revealed bulging discs at C5-6 and C6-7 mild facet hypertophy, straightening of the upper cervical spine, and bulging of the annulus fibrosus at C7-T1. CL. Med. CX 8; Ex 15. Mr. Jean-Louis saw Claimant again on October 21 and 22, 2002, and Claimant underwent cervical epidurals administered by Dr. Cole on November 13, 2002 at C6/C7, and on November 20 and 27, 2002, at C5/C6 for degenerative disc and joint disease. CL. Med. CX 10. CL. Med. CX 10.

On April 7, 2003, Dr. Drewniany performed an IME. CL. Med. CX 9. He took a history of Claimant's symptoms and reported that "patient has had no

specific injury…." He opined that Claimant has carpel tunnel and probably can not return to work as a welder/mechanic. He also noted that MRI results revealed "difficulties up in the neck" and he recommended a follow-up evaluation of that area. CL. Med. CX 9; EX17.

On November 13, 2002 and April 10, 2003, Dr. Cole diagnosed degenerative disc and joint disease of the cervical spine and later provided treatment from May through August; however, Dr. Cole did not specifically address the etiology of Claimant's cervical problems. He subsequently administered injections at C4/C5, C5/C6/, and C6/C7 on May 5, 2003. A report dated August 7, 2003, notes that Claimant had a disability rating for his arm, but expressed concern "about disability associated with his neck," and inquired about neck surgery. CL. Med. CX 10. At a follow-up visit on December 3, 2003, Mr. Jean-Louis reported that the injection therapy provided no long term relief from pain, and that "most of the problem he is having in his cervical spine are associated with an on-the-job injury…." CL. Med. CX 10. Mr. Jean-Louis also reported that: "This case was discussed with Dr. Florete and he concurs," and Dr. Florete confirmed that he discussed the case with Mr. Jean-Louis. CL. Med. CX 10. Other than discuss Claimant's case with Mr. Jean-Louis, however, the record does not reflect that Dr. Florete ever personally reviewed Claimant's clinical data, met Mathis, examined him, or interacted with him personally in any way. CL. Med. CX 10.

Dr. Hudson, a neurosurgeon, saw Mathis on April 1, 2004. He obtained Claimant's symptom and medical history, reviewed MRI results, and performed a physical examination. He diagnosed a probable cervical strain superimposed on mild bulging discs at C4/C5, C5/C6, and C6/C7, and reported that: "This patient's complaints of neck pain and numbness and tingling in the upper extremity is causally related to the industrial accident on January 26, 2000 according to his history. He says that is when his symptoms started and therefore his on the job injury of the date is the causing factor of his symptomatology." CL. Med. CX 11; EX 18.

On August 23, 2005, Dr. Hudson was deposed. He testified that Claimant was first injured in 1998 when he received a blow to the back of the neck. Claimant started having headaches prior to that but no neck or arm pain until July 26, 2000, when he had another injury and started having neck and arm pain. Hudson Depo at 6-9. The history given to Dr. Hudson does not mention that Claimant hit his wrist on July 26, 2000. Hudson Depo at 9-10. In assessing Claimant's symptoms, Dr. Hudson explained that a cervical injury can mimic carpel tunnel syndrome, but cervical injuries have distinct characteristics that

differentiate them from carpel tunnel syndrome, including neck pain and pain radiating down the arms. Carpel tunnel syndrome can cause pain in the wrist, hand, and forearm, and vaguely up into the shoulder, but not usually into the neck area. Hudson Depo at 14-15. Dr. Hudson did not treat Claimant for his carpel tunnel syndrome. Hudson Depo at 33.

Upon reviewing the MRI results, Dr. Hudson opined that if the headaches started right after the 1998 crossbar incident: "it is reasonable that the injury caused the headaches." Hudson Depo at 16-17. Dr. Hudson also testified that the repetitive use of vibrating power tools could cause the bulging cervical discs to become symptomatic and aggravate carpel tunnel syndrome. Hudson Depo at 18-19. He explained further that if Claimant only experienced headaches after the 1998 accident and not neck pain until two or three years later, it would be difficult to relate the neck pain to the 1998 accident or to "any on-the-job injury." Hudson Depo at 38. He diagnosed a cervical strain superimposed on the mildly bulging discs. Hudson Depo at 32-33.

Initially, Dr. Hudson thought the headaches were associated with the 1998 accident and, based upon the history he was given, the neck and arm pain were associated with the July 26, 2000 injury. Hudson Depo at 19-20. Upon further consideration of additional facts, however, Dr. Hudson observed that if Claimant did not complain of any neck pain for nearly two years after the July 26, 2000 injury, his neck condition "is not related to that accident, given that information." Hudson Depo at 34-35, 37. If he had "a lot of neck pain and headaches after the 1998 accident" and the neck pain went away but the headaches continued, then the neck pain would be related to the bulging discs and the FCE could have aggravated the 1998 injury. Hudson Depo at 38-39.

Dr. Hudson did not, however, believe that the neck and arm pain were related. Hudson Depo at 19-20. He explained that for the bulging discs to cause the arm pain they would need to be pushing on nerve roots and the MRI revealed that they were not impinging on the nerve roots. He, therefore, concluded that it is a reasonable medical probability that Claimant's headaches and neck pain were related to the mildly bulging discs but not his arm pain. Hudson Depo at 20-21. Dr. Hudson believes Mathis had reached MMI for the 1998 injury, but he did not address whether Claimant had reached MMI for the 2001 aggravation of his neck condition. Hudson Depo at 22. He did, however, advise against excessive turning of the head and turning the head to extremes more than ten times per hour. Hudson Depo at 24.

On May 4 and 11, 2004, Dr. Canlas performed epidurals at C7/T1 for cervical radiculopathy, degenerative disc and joint disease, and degenerative facet arthopathy. CL. Med. CX 12.

Discussion

As noted above, the parties agree that Claimant sustained an injury to his upper extremities on July 26, 2000, and that he is unable to return to his former job as a chassis mechanic. They disagree, however, in respect to Claimant's average weekly wage; the date, if any, Employer established suitable alternate employment; and whether any connection exists between Claimant's neck injury and his employment. Since he is claiming temporary total disability for his cervical condition, Tr. 45, it is first necessary to determine whether Claimant has sustained a non-scheduled, work-related neck injury or whether his injuries are limited to a scheduled award for the disability to his upper extremities.

Neck Injury

Claimant alleges that injuries revealed by an MRI of his cervical spine are attributable to his work as a chassis mechanic. He testified that he injured his neck when a steel crossbar fell across his shoulders and neck as he knelt to repair the floor of a chassis at work in 1998. Claimant argued further that the 1998 accident resulted in neck injuries that manifested in the upper extremity problems he first experienced on July 26, 2000, and that the diagnosis of the upper extremity problem as bilateral carpel tunnel syndrome was actually a "misdiagnoses." The pain in his arms, he contended, radiated from his neck injury. Claimant has also argued, however, that the physical requirements of the FCE triggered neck pain, or that heavy lifting or the repetitive use of vibrating tools aggravated a degenerative cervical condition. Recognizing that his attributions of etiology were varied and conflicted, Claimant, in his post hearing brief, argued that any uncertainty about the etiology of his neck condition is resolved by invocation of the presumption in Section 20 of the Act. Cl. Br. at 7.

Employer responded that Claimant's neck condition is not causally related either to an industrial accident or employment conditions. Emp. Br. at 26. It emphasized that Claimant first complained about his neck 15 months after the July 26, 2000 injury to his upper extremities. It noted that Claimant visited his treating physician, Dr. Kitay 15 times between August 24, 2000, and April 12, 2002, and never mentioned neck pain or injury. It cited record evidence that Claimant missed no time off work following the 1998 cross- bar incident and worked continuously

after that accident without interruption. Casting a cloud on Claimant's credibility, Employer also compared Claimant's hearing testimony that the crossbar incident occurred, with his October 4, 2004, deposition testimony that: "he did not suffer any other injuries with the Employer…. other than the July 26, 2000 date of accident." Emp. Br. at 28.

Etiology of Claimant's Neck Pain

Initially, it should be noted that Mathis claimed entitlement to compensation based upon the alleged 1998 crossbar incident, apparently on the theory that the pain in his hands and forearms on July 26, 2000, was a manifestation of pain which was actually radiating from the cervical injuries he sustained when the steel crossbar fell across his shoulders and neck. As Claimant describes the 1998 incident, he experienced pain for a few minutes, but "shook" it off and went back to work without a further episode of neck pain for several years. He allegedly advised his supervisor of the incident, but the supervisor did not testify in this proceeding, and Claimant acknowledges that he filed no written notice of injury. He did not immediately seek medical care. He testified that he later experienced headaches and received treatment in an emergency room, but the emergency room records show that Claimant reported that he had been experiencing recurrent symptoms of headache pain almost monthly since the time he was 8 years old; and he never mentioned to the hospital staff that he injured his neck and shoulders at work. He claims his personal physician told him these headaches were related to stress and "things" at work, but the records of Drs. Brooks and Dr. Sykes are not in evidence; and, assuming Dr. Brooks did link the headaches in 1998 and 1999 to Claimant's work, Claimant provided no notice of injury relating to his work-related headaches. He filed no written notice of injury relating to the 1998 crossbar incident and no neck claim was filed until August 15, 2002, when he asserted a work-related herniated disc in an LS-203. Under these circumstances, Employer contends that Claimant's resort to relief predicated on the 1998 incident is time barred under Sections 12 and 13 of the Act.

Whether Section 12 and 13 bar relief for the original neck incident in 1998, will be considered in a moment; however, it first is necessary to determine whether the presumption in Section 20 of the Act is triggered by an aggravation of Claimant's cervical condition which induced neck pain symptoms in October, 2001.

Working Conditions and the FCE

The Board has held that lay evidence can establish whether working conditions existed that could have caused the harm claimed, Sewell v. Noncommissioned Officer's Open Mess, 32 BRBS 127(1997), recon. denied En Banc, (1998); Quinones v. H.B. Zachery, Inc., 32 BRBS 6 (1998), and if such conditions did exist, and did aggravate, contribute to, or combine with a pre-existing disease or underlying condition, the entire resultant disability is compensable. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

To be sure, Employer has challenged Claimant's credibility in a number of respects, but his testimony regarding the tools he used and the work he performed was neither challenged nor impeached. Employer introduced into evidence a job description, which, while identified as a different employer, was nevertheless offered as the job description of a mechanic like Mathis. This description confirms that a mechanic's job requires lifting heavy objects and use of powered hand tools. Claimant, moreover, testified without contradiction that his job, at times, entailed using air or vibrating impact tools up to 8 hours per day, and Dr. Hudson took these conditions into account. He concluded that the repetitive use of vibrating power tools could cause the bulging cervical discs, revealed on an MRI, to become symptomatic. Dr. Hudson further testified that the FCE could have aggravated Claimant's cervical condition. Consequently, the record contains uncontested medical evidence that either the FCE or Claimant's working conditions could have caused the cervical harm, and this is sufficient to invoke the Section 20 presumption. Conoco v. Director, 33 BRBS 187 CRT (5th Cir. 1999); Marinelli v. American Stevedoring, Ltd., 34 BRBS 112 (2000); Carlisle v. Bunge Corp., 33 BRBS 133 (1999); Everson v. Stevedoring Services, 33 BRBS 149 (1999); Quinones v. H.B. Zachery, Inc., 32 BRBS 6 (1998),

Rebuttal

Upon invocation of the presumption, it is Employer's burden within the jurisdiction of the Eleventh Circuit Court of Appeals, where this case arises, to rule out a causal relationship between Claimant's employment and the injury. Brown v. Jacksonville Shipyard, 893 F.2d 294 (11th Cir. 1990); *Contra*, Conoco v. Director, 194 F. 3d 684 (5th Cir. 1999) (requiring employer to go forward with substantial countervailing evidence to rebut the presumption). *See also*, Merill v. Todd Pacific Shipyards Corporation., 25 BRBS 140 (1991), *aff'd*, 892 F.2d 173, 23 BRBS 12

(CRT) (2d Cir. 1989). When the presumption applies to the aggravation of a pre-existing injury, the employer must establish that claimant's condition was not caused or aggravated by his employment. Rajotte, *supra;* Seaman v. Jacksonville Shipyards, 14 BRBS 148 (1981). This, the Board has ruled, an employer may accomplish only with facts, not speculation or hypothetical probabilities. Dewberry v. Southern Stevedoring Corp. 7 BRBS 322 (1977), aff'd 590 F.2d 331 (4th Cir. 1978); Smith v. Sealand Terminals, 14 BRBS 844 (1982).

It should be noted that in determining whether Employer has ruled out a causal relationship between Claimant's employment and the injury, as required by Brown v. Jacksonville Shipyard, it is necessary to consider the entire record, not just substantial countervailing evidence that would tend to sever the causal nexus. For example, Claimant's lack of symptom history of neck pain was an important consideration in Dr. Kitay's determination to reject Claimant's effort to link his neck complaints to his work. As Claimant's treating physician, Dr. Kitay's opinion constitutes substantial countervailing evidence that might otherwise rebut the presumption. It does not, however, rule out a causal nexus, because it does not address the potential contribution of the work-related FCE or reflect consideration of aggravating work conditions on a pre-existing cervical condition. Thus, it appears that the analysis required to rule out a work-related etiology is quite similar to the analysis required in other Circuits after the presumption has been triggered and rebutted. *See,* Del Vecchio v. Bowers, 196 U.S. 280 (1935). It is an analysis which takes into consideration the record evidence viewed in its entirety.

Claimant's Credibility

Crucial to any assessment of the etiology of Claimant's cervical condition, in this instance, is his pain complaints over time. Both Dr. Kitay, as noted above, and Dr. Hudson, in his post-hearing deposition, described Claimant's reported neck pain complaints as key factors in their evaluation of whether those complaints were related to his work. Before turning to the medical evidence, however, both the timing and nature of Claimant's subjective pain complaints must be established and his credibility in reporting his symptoms must be evaluated.

In its post-hearing brief, Employer undertakes the challenge of rebuttal by attempting to de-link Claimant's neck pain symptoms from either the 1998 incident or his subsequent employment. Employer thus challenges Claimant's credibility, alleging that he testified at his deposition that he suffered no injury other than the July 26, 2000, injury at work, thus calling into question whether the 1998 crossbar incident actually occurred. In citing to the alleged conflict between Claimant's

deposition and trial testimony, however, Employer apparently overlooked the errata sheet attached to the deposition which specifically corrected the deposition transcript's failure to mention the 1998 incident. Consequently, there is no deposition/trial testimony conflict in Claimant's account of the crossbar incident.

Employer also challenges Claimant's credibility on grounds that his testimony and other documents demonstrate inconsistencies or outright contradictions when he denied telling Dr. Florete about the 1998 incident, denied telling Dr. Florete that neck pain started in March of 2000, and denied telling Dr. Hudson that the neck pain stemmed from July 26, 2000 accident; but testified that he experienced neck pain before July, 2000, and reported neck pain to his personal physician, while reporting to Dr. Collier that he had no other injuries.[5]

Citing Claimant's testimony at page 70 of the hearing transcript, Employer represented that Claimant testified that he experienced neck pain before July, 2000, (*See*, Emp. Br. at 31), and, citing page 72 of the transcript it represented that Claimant testified that he reported neck pain to his personal physician. (*See*, Emp. Br. at 32). In both instances, however, Claimant's testimony related to his headache pain, and documents in evidence confirm that he did seek treatment for headache pain during the period in question. As Employer alleges further, Claimant did deny telling Dr. Florete about the crossbar incident; however, it appears his denial was neither evasive nor inconsistent with the other evidence in this record. At the Institute of Pain Management, Claimant discussed his history with Mr. Jean-Louis, not Dr. Florete, and to the extent he did not recall the crossbar incident to Mr. Jean-Louis, Dr. Collier, or Dr. Drewniany, his lack of recall seems consistent with the relatively minor impact that incident actually had on him.

Weighing Expert Opinion Evidence

The medical evidence assessing the etiology of Claimant's cervical problems consists of Dr. Kitay's observation that the lack of any cervical symptomatology during the year and half he treated Claimant rendered him unable to attribute Claimant's neck complaints to the July 26, 2000 accident; Mr. Jean-Louis' opinion that Claimant's neck injuries are attributable to his job-related activities; and the

[5] In connection with the NCV performed on May 30, 2001, Dr. Collier took Claimant's history and stated: "He denies any upper back or neck pain." Thereafter, Dr. Drewniany saw Claimant for an IME on April 7, 2003. He took a history of Claimant's symptoms and reported that "patient has had no specific injury…."

evaluation of etiology by Dr. Hudson, who initially opined that Mathis's complaints of neck pain were causally related to the industrial accident of July 26, 2000, but, subsequently, revisited his analysis. The record shows that Dr. Kitay is an orthopedic surgeon. Mr. Jean-Louis is a physician's assistant, and Dr. Hudson is a neurosurgeon. I have taken the level of training and expertise of each of these individuals into consideration in assigning evidentiary weight to their respective opinions. In addition, I have taken into consideration that Dr. Kitay's treatment of Claimant was limited to the bilateral carpel tunnel syndrome; however, it is nevertheless significant that the absence of cervical pain complaints during the many months Dr. Kitay saw Claimant rendered him unable to attribute the etiology of the neck pain to the July 26, 2000 incident.

Considering the foregoing factors, I have accorded limited weight to the etiology assessment of Mr. Jean-Louis. As a physician's assistant at the Institute for Pain Management, it is likely that Mr. Jean-Louis has gained valuable experience in dealing with and assisting pain complaint patients; however, the record does not reflect whether he has any specialized training in determining the causality of disease or injury or how long he has actually occupied his position at the Institute. Further, although the record reflects that Mr. Jean-Louis discussed Claimant's case with Dr. Florete who often concurred with Mr. Jean-Louis' assessments; in terms of evaluating the etiology of Claimant's cervical complaints, it does not appear in this record that Dr. Florete personally examined either Claimant or his medical records.[6]

In contrast, based upon Dr. Hudson's expertise as a neurosurgeon, his comprehensive review of Claimant's cervical and headache pain complaints, over time, and his comprehensive review of the clinical data, including the MRI results, I have accorded the greatest evidentiary weight to his opinions regarding the etiology of Claimant's cervical condition. Further, Dr. Hudson's conclusions are confirmed by Dr. Kitay, to the extent that both he and Dr. Kitay find no direct causal link between the July 26, 2000 accident and the manifestations of neck pain Claimant experienced 15 months later.

[6] Claimant received treatment for his neck pain at the Institute from Drs. Cole, and Canlis, but they did not assess the etiology of his cervical condition. Dr. Peter Bream read a cervical x-ray dated November 27, 2001, as revealing mild hypertrophic sponylosis and mild deformity at C5 "suggesting old injury," but he, too, did not opine regarding the etiology of the injury. Drs. DePadua, Greider, and Drewniany also evaluated Claimant but none assessed the etiology of his cervical injuries. Finally, Claimant testified that Drs. Sykes and Brooks related his headaches to his job, but no medical records from these physicians were introduced into evidence. *See*, CL Med Ex 1-12 and Employer's exhibits 1-32.

Dr. Hudson's Evaluation

Significantly, the weight I have accorded Dr. Hudson's opinion seems entirely consistent with the reliance both parties repose in his assessment of the etiology of Claimant's cervical pain. In Claimant's post-hearing brief, for example, the only specific reference to a medical opinion relating Claimant's work to his neck pain is found on page 6. Claimant reports: "Dr. Hudson stated that the complaints of neck pain and numbness, and tingling in the upper extremities were causally related to the industrial accident of July 26, 2000." Cl. Br. at 6. Employer, too, relies upon Dr. Hudson's opinion, and advises that: "…it is Dr. Hudson's opinion that Claimant's neck complaints are not causal related to the July 26, 2000 date of accident." Emp. Br. at 33. Edified by these polar opposite interpretations, we turn to Dr. Hudson's analysis of the situation, and find that both parties misconstrue his opinions.

After reviewing the MRI results, Dr. Hudson diagnosed a cervical strain superimposed on mildly bulging discs, and initially opined that Claimant's mildly bulging cervical discs would be compatible with a blow to the neck. He reasoned that if the headaches started right after the 1998 crossbar incident, "it is reasonable that the injury caused the headaches." Consequently, based upon the history he was given, Dr. Hudson initially concluded that the headaches were associated with the 1998 accident while the neck and arm pain was associated with the July 26, 2000 injury; but his analysis did not end there.

Given an updated symptom history, Dr. Hudson explained that if Claimant did not complain of any neck pain for nearly two years after the July 26, 2000 injury, his neck condition "is not related to that accident." Further, if Claimant only experienced headaches after the 1998 accident and not neck pain until two or three years later, it would, according to Dr. Hudson, be difficult to relate the neck pain to the 1998 accident or to "any on-the-job injury." In contrast, if Claimant had "a lot of neck pain and headaches after the 1998 accident" and the neck pain went away but the headaches continued, then, in Dr. Hudson's opinion, the neck pain would be related to the bulging discs, and either the FCE or the repetitive use of vibrating power tools could cause the bulging cervical discs to become symptomatic and aggravate carpel tunnel syndrome.

It is thus clear from the totality of Dr. Hudson's testimony that once he realized that the symptom history Claimant initially gave him was not sufficiently comprehensive, he provided essentially conditional etiology evaluations that

depend upon a more thorough consideration of the facts related to Claimant's symptom history. As a result, to determine which etiology applies to Claimant's conditions in accordance with Dr. Hudson's evaluation, it is necessary to review what the record indicates about the intensity and location of the pain Claimant experienced after the crossbar incident and the onset of the neck and headache pain.

Applying Dr. Hudson's Rationale

In Dr. Hudson's opinion, Claimant's mildly bulging cervical discs would, under some circumstances, be compatible with a blow to the neck. He testified that if Claimant had "a lot of neck pain and headaches after the 1998 accident" and the neck pain went away but the headaches continued, then, in Dr. Hudson's opinion, the neck pain would be related to the bulging discs and Claimant's working conditions or the FCE could have aggravated the 1998 injury. Alternatively, if Claimant only experienced headaches after the 1998 accident and not neck pain until two or three years later, Dr. Hudson observed that it would be difficult to relate the neck pain to the 1998 accident.

The record shows that the 1998 incident was a relatively minor accident which made very little impression on Claimant. After a few minutes, he returned to work, sought no medical treatment, and had no symptoms of neck pain for several years. He filed no written report of the incident but mentioned it orally to his supervisor. He claims he momentarily experienced pain, but shook it off and returned to work in a few minutes. He lost no time off work and sought no medical treatment. He reported no neck pain as a result of this incident, and during a subsequent hospital visit for headache pain on November 29, 2000, he never mentioned the crossbar incident. He did, however, advise the hospital staff that he had a history of frequent recurrent headaches since age 8. He testified that his family doctor attributed his headaches to stress at work and "things" but it is unclear whether Dr. Sykes or Dr. Brooks was aware of Claimant's longstanding history of headaches as reported to the hospital staff.

It thus appears that Claimant experienced headache symptoms chronically since early childhood, and he experienced very little, if any, neck pain or discomfort as a result of the 1998 incident. Thus, the record reflects that the 1998 crossbar incident produced neither "a lot" of neck pain nor, according to the hospital records, a change in Claimant's headache pain. To the contrary, the record shows that the 1998 incident had very little impact on Claimant, physically, and made very little impression upon him at the time or subsequently. As noted

previously, he often did not even recall it when reporting his accident history to physicians who treated him.

Thus, considering the pain conditions Dr. Hudson laid down for determining whether Claimant's bulging discs were caused by the 1998 incident, I conclude that Claimant did not experience "a lot of neck pain" either at the time of the 1998 crossbar incident or in the three year period following the incident, and accordingly, based upon the analytical framework provided by Dr. Hudson, I conclude that the 1998 incident did not the cause Claimant's bulging discs or his current cervical condition.[7]

July 26, 2000 Accident

Dr. Hudson saw Mathis on April 1, 2004. He obtained Claimant's symptom and medical history, reviewed MRI results, and performed a physical examination. He diagnosed a probable cervical strain superimposed on mild bulging discs at C4/C5, C5/C6, and C6/C7, and, as Claimant recounted in his post-hearing brief, Dr. Hudson reported that: "This patient's complaints of neck pain and numbness and tingling in the upper extremity is causally related to the industrial accident on January 26, 2000 according to his history." Dr. Hudson explained further, however, that this etiology assessment was predicated on Claimant's report of the July 26, 2000, onset of his neck pain symptoms. According to Dr. Hudson, Claimant: "… says that is when his symptoms started and therefore his on the job injury of that date is the causing factor of his symptomatology." CL. Med. CX 11; EX 18.

On August 23, 2005, Dr. Hudson was deposed. He testified that Claimant was first injured in 1998 when he received a blow to the back of the neck, but noted that Claimant had no neck or arm pain until July 26, 2000, when he had another injury. In assessing Claimant's symptoms, Dr. Hudson explained that a cervical injury can mimic carpel tunnel syndrome, but a cervical injury has distinct characteristics that differentiate it from carpel tunnel syndrome, including neck pain and pain radiating down the arms. Carpel tunnel syndrome, in contrast, causes pain in the wrist, hand, and forearm, and, as Dr. Hudson described it, vaguely up into the shoulder; but, according to Dr. Hudson, not usually into the neck area. It is, therefore, significant that Dr. Hudson's description of the pain pattern of carpel

[7] I am mindful that Dr. Peter Bream interpreted a November 27, 2001, diagnostic cervical x-ray as revealing mild hypertrophic spondylosis and mild deformity at C5 "suggesting old injury," but neither Dr. Bream nor any other physician on this record assessed how "old" that injury might be or its cause.

tunnel is consistent with the pattern Claimant described to Dr. DePadua following the July 26, 2000 incident; that is, pain radiating up into the shoulder not the neck.

Considering these diagnostic distinctions, Dr. Hudson reasoned that Claimant's neck and arm pain were unrelated. He explained that bulging discs cause arm pain when they push on nerve roots, and the MRI revealed that Claimant's cervical discs were not impinging on the nerve roots. He, therefore, concluded that Claimant's headaches and neck pain were related to the mildly bulging discs, but not his arm pain. Nor is Claimant's bulging discs related to the July 26, 2000 accident. Again, Dr. Hudson explained that if Claimant did not complain of any neck pain for nearly two years after the July 26, 2000 injury, his neck condition "is not related to that accident, given that information." To this extent, Dr. Hudson's reasoning is, as previously mentioned, entirely consistent with Dr. Kitay's.

Since the record clearly shows that Claimant did not complain of neck pain for nearly two years after the July 26, 2000 accident, I conclude, based upon the analytical framework provided by Dr. Hudson, that the July 26, 2000 accident did not cause Claimant's bulging discs and that Claimant's hand, wrist, and forearm complaints, following the July 26, 2000 accident resulted from bilateral carpel tunnel syndrome unrelated to Claimant's cervical problems. The initial disability resulting from the July 26, 2000 accident was, therefore, restricted to Claimant's upper extremities which reached maximum medical improvement and was properly covered by the scheduled award.

Aggravation of a Pre-Existing Condition

Yet, the fact that Dr. Hudson's analysis indicates that Claimant's bulging cervical discs are degenerative and unrelated to his work does not end the inquiry. In his April 1, 2004 report, Dr. Hudson concluded that Claimant: "certainly does have degenerative disc disease with some bulging of the discs in his cervical spine at several levels. He was a set up to start having symptoms in the neck… and was more susceptible than the usual population because of the degenerative condition of his spine." Since Dr. Hudson's diagnosis of degenerative disc disease, unlike his initial etiology assessment, was based on the MRI not Claimant's initial pain history reports, Dr. Hudson did not change this diagnosis at his deposition.

Further, at his deposition, Dr. Hudson testified that the repetitive use of vibrating power tools at work could cause the bulging cervical discs to become more symptomatic or the FCE could have aggravated Claimant's cervical

condition. As a consequence, since the first situation involves an aggravation due to conditions at work, and the second involves an aggravation due to an FCE performed in connection with the July 26, 2000 accident, I conclude either or both would represent a work-related aggravation of Claimant's pre-existing cervical disc disease.

Failure to Rebut the Presumption

Thus, considering Dr. Hudson's evaluation, it would be difficult to conclude that Employer has adduced evidence sufficient to rule out a causal nexus between Claimant's work and his cervical complaints in accordance with Brown, *supra*, and accordingly, Employer has failed to rebut the Section 20 presumption. To the contrary, even if the presumption were deemed rebutted under case law applicable in other Circuits, Dr. Hudson's well reasoned and unchallenged assessment of Claimant's pain symptoms indicates, upon consideration of the record reviewed in its entirety, a work-related aggravation of the degenerative cervical condition sufficient to establish coverage, and against which Sections 12 and 13 provide no bar to relief.

Sections 12 and 13

Significantly, the record contains no medical evidence of any neck pain symptoms until Claimant went to the St. Vincent Hospital emergency room on November 21, 2001, complaining of neck pain. A diagnostic cervical x-ray on that date read by Dr. Peter Bream revealed mild hypertrophic spondylosis and mild deformity at C5 "suggesting old injury." The record further shows that Claimant last worked and used vibrating tools no later than September 3, 2001, but he testified that he first experienced neck pain following the FCE on October 22, 2001. It thus appears from the onset of his neck pain symptoms, which his physicians have deemed key to assessing the etiology of his condition, that the aggravation did not occur before the October 22, 2001.

The record contains no evidence that Claimant had notice of the aggravation before October 22, 2001, and the Employer had notice of the injury, and, in fact, controverted any treatment for the neck by November 30, 2001. It, therefore, received notice which was presumptively sufficient. Cx 7; *See*, Shaller v. Cramp Shipbuilding & Drydock Co., 23 BRBS 140 (1989). Thereafter, within a year the claim was filed. Cx 8. Claimant has, accordingly, complied with Sections 12 and 13 of the Act. Further, since the cervical aggravation is a job-related injury, it is

compensable. Before addressing the nature and extent of disability, however, it is first necessary to discuss Claimant's average weekly wage.

Average Weekly Wage
July 26, 2000 Injury

In his post-hearing brief, Claimant contended that the parties disagree over whether Section 10(a) or 10(c) should be used to calculate Claimant's average weekly wage. Claimant stated that Section 10(a) is the applicable statutory provision because Claimant worked 52 weeks in the year preceding the July 26, 2000 injury. Cl. Br. at 22. Employer, too, believes that "Section 10(a) is clearly the applicable method of calculating" the AWW in this case. Emp. Br. at 24. Consequently, there is no disagreement over the statutory provision the parties would apply. The record shows that Claimant worked six days a week each of the 52 weeks prior to the July 26, 2000 accident; however, the case law dictates that the vacation/holiday pay and container royalties he earned in the year preceding the injury, but which vested and were paid post-injury, must be calculated under Section 10(c) and included in the average weekly wage calculation.

Turning to Claimant's earnings, Employer asserts that Claimant's gross wages during the period July 26, 1999 to July 26, 2000 totaled $48,137.50. Claimant states that his gross wages during this period totaled $49,193.50. The ILA wage summary, however, indicates both totals are incorrect. Claimant's total includes earnings through July 30, 2000, while Employer's total includes earnings through July 23, 2000. The record shows that Claimant's TTD benefits commenced on July 30, 2000, and for the week ending Sunday, July 30, 2000, his "last day worked" was Saturday, July 29, 2000. Claimant, therefore, worked three days after the July 26, 2000 date of injury, and during his last week of work he earned $1,056.00 for 32 hours of straight time and 8 hours of overtime. His average hourly earnings that week amounted to $26.40, and working a six day work week, averaging 6.67 hours per day, his average daily wage was $176.09. Adding in the pre-injury days he worked during his last week on the job that employer excluded and subtracting the post-injury days he worked that week which Claimant included, I have adjusted Claimant's average weekly wage by $528.27. Thus, for the 52 week period preceding the July 26, 2000 accident, Claimant worked a total of 1879.61 hours, and received gross wages totaling $48,665.77. ($48,137.50 + $528.27 = $48,665.77). He worked 312 days and his average daily wage amounted to $155.98.

Claimant also contends that his gross earnings should be increased to reflect vacation and holiday pay, totaling $4,784.00, and container royalties, totaling $6,411.51. Cl. Br. at 23-24. In its post-hearing brief, Employer addressed the propriety of including vacation and holiday pay and container royalties in an average weekly wage calculation. Employer stated that "… the fourth district (sic) court held that holiday, vacation, and container royalty earnings are "wages" under Section 2(13) of the LWHCA if they were earned through work. Universal Maritime Service Corporation v. Wright, 155 F.3d 330 (4th DCA (sic) August, 1998)." Emp. Br. at 7. Nevertheless, Employer's gross wage calculation for purposes of determining the average weekly wage does not include vacation and holiday pay or container royalties, Emp. Br. 25; and Employer, despite its acknowledgement that Universal Maritime includes such payments in an average weekly wage calculation if they are earned, provided no explanation or discussion of its rationale for excluding them.

Now, the Eleventh Circuit Court of Appeals has reasoned that it is inappropriate to included in *a post-injury wage* earning capacity calculation the vacation and holiday pay and container royalties a claimant earned per-injury, *see*, Seaco v. Richardson, 136 F.3d 1290 (11th Cir. 1998), but the Court has not addressed the issue presented here. We are not here dealing with a post-injury wage earning capacity situation. The royalties and pay involved here were earned pre-injury and paid post-injury. In this situation, the Fifth Circuit's decision in James J. Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426, 432 (5th Cir. 2000), seems more closely analogous. Thus the Court in Gallagher interpreted Universal Maritime to mean that if a benefit is paid in dollars and cents and, therefore, has a value, it constitutes a wage rather than a fringe benefit under § 2(13). Consequently, in Gallagher, the Fifth Circuit held that container royalty benefits (CRB) paid annually to longshoremen are properly included as wages in the average weekly wage calculation under the Act. Id. at 433. Moreover, the Court's rationale applies equally to vacation and holiday pay.

Generally, then, an average weekly wage calculation includes vacation, holiday and container royalty earnings and involves a two step process. Pursuant to Universal Maritime, a claimant's average weekly wage at the time of his injury must be calculated, and then an average weekly wage must be calculated which takes into consideration vacation/holiday, and container royalty earned in the year prior to the injury but which vested and was paid post-injury. Crochetti v. Ceres Marine Terminals, BRB No. 00-0297 (November 29, 2000). In Crochetti, the Board noted:

> Concerning the actual calculation of average weekly wage, the circuit court observed that the timing of the vacation/holiday and container royalty payments, which in the instant case occurs after the close of the contract year on September 30, requires the determination of average weekly wage under Section 10(c). Wright, 155 F.3d at 327, 33 BRBS at 28(CRT). Moreover, to prevent a double recovery to claimant, the court held that average weekly wages must be calculated twice; i.e., an average weekly wage derived from claimant's earnings from his labor at the time of injury and a second average weekly wage incorporating claimant's vacation/holiday and container royalty payments, which applies to compensation payments made from October 1 after the date of injury. Id., 155 F.3d at 329-330, 33 BRBS at 30(CRT). [8]

In this instance, Claimant's exhibit 13 sets forth a container royalty of $6,411.51 and vacation and holiday pay amounting to $4,784.00, and neither total is contested by Employer. Thus, guided by the Court's decision in Gallagher, and the Board's decision in Crochetti in applying Section 10(c), Claimant's step 1 pre-injury average weekly wage amounts to his average daily wage times 300 or $46,794.00 as his average annual earnings, and an average weekly wage of $899.88. His vacation and holiday pay and container royalty totaled $11,195.51 which, when divided by 52 in accordance the principle reflected in Gallagher and Crochetti, yields $215.30, which must be added to the step 1 average weekly wage, thus producing a Section 10(c) average weekly wage totaling $1,115.18 for Claimant's July 26, 2000 injury.

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[8] In Crochetti, the Board approved, under Section 10(c) a divisor of 68 which represented the actual number of weeks claimant worked during a two-year pre-injury period, and then approved a divisor of 104 for the additional factor which took into consideration the vacation/holiday pay/container royal earnings over the two contract years. In J. Flanagan Stavedores v. Gallagher, *supra*, the Court approved an average weekly wage calculation based upon claimant's gross earnings in the year preceding the injury plus $707.56 in vacation pay and $8,136.85 in CRB distribution divided by 48 weeks; the number of weeks claimant actually worked, rather than 52. The Court noted that to be "technically correct," total earnings would have included four weeks of additional work divided by 52, but the result was the same. The Court agreed that the decision to carve out the four-week period of lost work facilitated the goal of "mak[ing] a fair and accurate assessment" of the amount that claimant "would have the potential and opportunity of earning absent the injury." *Gatlin,* 936 F.2d at 823.

Nature and Extent of Disability
Carpel Tunnel

The record shows that for the period July 26, 2000, through October 22, 2001, Claimant returned to work sporadically. He received temporary and total disability compensation from July 30, 2000, to September 27, 2000, and from December 9, 2000, to January 1, 2001, and thereafter additional temporary total disability was paid through the end of November, 2002. While the date he reached MMI for his wrist condition varies considerably in the medical reports of Drs. Greider and Kitay, he received compensation for a 4% permanent partial impairment of the right upper extremity impairment as a consequence of the carpel tunnel syndrome. The date of MMI corresponding to the 4% impairment rating is March 27, 2001. Claimant now seeks an award of ongoing temporary total disability after December, 2002.

As discussed above, Claimant's disability prior to October 22, 2001, was due to the carpel tunnel syndrome, whether triggered by a blow to his wrist or by the conditions of his employment, which arose or became manifest on July 26, 2000. Claimant's carpel tunnel reached maximum medical improvement on October 15, 2001 with a 3% impairment rating as determined by Dr. Greider and confirmed by Dr. Kitay on November 9, 2001. Beginning September 3, 2001, Claimant was allegedly unable, due to the carpel tunnel syndrome, to return to his job as a chassis mechanic. Nevertheless, if Claimant retained any residual wage earning capacity, notwithstanding the disability caused by the carpel tunnel syndrome, a scheduled award is proper and the amount of loss of wage earning capacity would be irrelevant. Sketoe v. Dolphin Titan Int'l, 28 BRBS 212 (1994). So long as suitable alternative employment is reasonably available to Claimant, whether paying at or near his average weekly wage or minimum wage, the schedule would apply. *See*, Pepco v. Director, 449 U.S. 268, 273,281-83 (1980). If suitable alternate employment is not available, however, he may be deemed totally disabled by the carpel tunnel syndrome. Id. *See also*, Winston v. Ingalls Shipbuilding, 16 BRBS 168 (1984).

Aggravation of the Cervical Condition

For the period beginning October 22, 2001, Claimant sustained an aggravation of a degenerative cervical spine condition due either to the use of vibrating tools at work or a functional capacity evaluation administered to determine the impact of the carpel tunnel syndrome on his ability to perform various physical tasks. Although duration of symptoms is a factor suggesting

permanency, other factors indicate that Claimant's job-related cervical disability remains temporary. Thus, no physician has concluded that Claimant has reached maximum medical improvement for this injury or that it is indefinite in nature; he has not been rated for this injury, *see*, Jones v. Genco, 21 BRBS 12 (1988), as yet, he has no permanent cervical restrictions, and from all that appears in this record his neck condition is, at present, properly deemed a temporary impairment as Claimant alleges. Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988); Mills v. Marine Repair Serv., 21 BRBS 115 (1988), modf'd. on other grnds, 22 BRBS 335 (1989). The cervical condition is not a scheduled injury.

The question then is whether the 3% permanent partial upper extremity impairment totally disabled Mathis and, if not, whether the subsequent cervical spine injury rendered him either unable to work or further reduced his wage earning capacity. If he retains a residual wage earning capacity, his disability is temporary and partial. If he is unable to work, it is temporary and total.

Wage Earning Capacity

As Employer recognizes, the schedule in Section (8)(c) of the Act is entitled "Permanent Partial Disability" and applies under Pepco v. Director, 449 U.S. 268, 273, 281-83 (1980), to disabilities that are "partial" in character and "permanent" in quality. The schedule does not apply to injuries that result in permanent total disability or temporary disabilities. Pepco, *supra*. Consequently, in this proceeding, since Claimant has demonstrated that his injuries prevent him from returning to his job as a mechanic, he must be deemed totally disabled unless the Employer otherwise establishes the availability of "suitable alternate employment." New Orleans Stevedores v. Turner 661 F.2d 1031 (5th Cir. Nov. 1981). P&M Crane Company v. Hayes 930 F.2d 424 (5th Cir. 1991); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988; Diaosdado v. John Bloodworth Marine, 29 BRBS 125 (9th Cir. 1996); Hairston v. Todd Shipyards Corp., 21 BRBS 122 (CRT) (9th Cir. 1988); Palombo v. Director, 937 F.2d 70 (2d Cir. (1991). If suitable alternate employment is demonstrated, Claimant must be permitted to show that he diligently tried and reasonably failed to obtain such employment. *See,* Palombo*, supra;* Williams v. Halter Marine Services, 19 BRBS 248 (1987). Should Claimant succeed in demonstrating the unavailability of suitable jobs, his disability is total, and the schedule is inapplicable. Palombo*, supra*. If, however, Claimant's search lacked reasonable diligence or if it was indeed successful and he secured a job, the disability is partial regardless of any increase or decrease in his residual wage

earning capacity. *See*, Rowe v. Newport News Shipbuilding and Drydock Co., 193 F.3d 836 (4th Cir. 1999); Southern v. Farmers Export Co., 17 BRBS 64(1985).

Since Claimant, in this instance, has shown that he cannot return to his former job, the burden shifts to the Employer to establish "suitable alternative employment." New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981). Claimant argues, however, that the term "suitable alternative employment" must be defined on a case by case basis, and the Employer identified jobs that either were available, but not suitable, or suitable, but not available, either because Claimant was unable to secure the job or because Employer's vocational expert did not adequately evaluate the job requirements or Claimant's capabilities.

Employer's Burden

Now, an employer's burden in establishing suitable alternative employment has not yet been addressed by the Eleventh Circuit. It has, however, been considered by the First, Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits, and the D.C. Circuit, and the guidance provided is mixed. Air America, Inc. v. Director, 597 F.2d 773 (1st Cir. 1979); Argonaut Ins. Co. v. Director, 646 F.2d 710 (1st Cir. 1981); Palombo v. Director, 937 F.2d 70 (2nd Cir. 1991); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3rd Cir. 1979); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988); Tann v. Newport News Shipbuilding and Drydock Co., 84 F. 2d 540 (4th Cir. 1984); Universal Maritime Corp. v. Moore, 126 F. 3d 256 (4th Cir. 1997);P&M Crane Company v. Hayes, 930 F.2d 424 (5th Cir. 1990); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedore's v. Turner, 661 F.2d 1031 (5th Cir. 1981); Diosdado v. John Bloodworth Marine, 37 F.3d 629 (5th Cir. 1994); Bunge v. Carlisle, 227 F.3d 934 (7th Cir. 2000); Stevens v. Director, 909 F.2d 1256 (9th Cir. 1990); Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988).

In the First Circuit, for example, an employer need not prove the existence of actual available jobs when it is "obvious" that jobs are available for someone with the claimant's age, education, and experience. *See*, Air America, *supra*. In contrast, Diosdado indicates that one job is insufficient as a matter of law to satisfy the employer's burden. Similarly, in Lentz, the court held that the identification of a single job opening as an elevator operator does not satisfy the "suitable alternative employment" standard. The rationale in Lentz suggests it would be unreasonable to expect an illiterate Claimant to seek out and secure one specific job. Hairston further suggests that it is not sufficient to point to general work a Claimant may be physically able to perform. In the Ninth Circuit, the employer

must identify specific suitable jobs. Under Hayes and Turner, Employer need only demonstrate that there were jobs reasonably available within Claimant's capabilities and as few as one or two available jobs within Claimant's specific capabilities. I note further that the Second Circuit in Palombo cited with approval, the limited burden Turner imposes upon the employer. At the opposite pole of appellate reasoning, the Fourth Circuit in Moore held that an employer may, in assessing job requirements, simply rely on the general job descriptions found in the Dictionary of Occupational Titles and need not contact employers to determine the actual requirements of an available job or whether the employer would hire someone with claimant's vocational profile. Guided by these diverse pronouncements, we turn to the jobs that Employer considered available and suitable for Claimant Mathis: first in light of his carpel tunnel condition, and then in light of his carpel tunnel syndrome and the injury caused by the work-related exacerbation of his pre-existing cervical condition.

July 26, 2000 Injury
(Carpel Tunnel Syndrome)

Rick Robinson conducted two labor market surveys. Employer in its post-hearing brief contended that Robinson's first labor market survey completed on February 5, 2002, identified several jobs that were available for the period October 15, 2001 to January 30, 2002, in the Jacksonville labor market which Dr. Kitay approved as consistent with Claimant's physical restrictions and which were suitable for Claimant considering his age, education, experience, work history, and physical limitations. Claimant contends that he had not reached overall maximum medical improvement at the time of the first labor market survey and, therefore, the first survey can not demonstrate suitable alternate employment.

Initially, it should be noted that Claimant had reached maximum medical improvement for his carpel tunnel syndrome as of the time the first labor market survey was conducted. Drs. Greider determined, and Kitay confirmed, that Claimant had reached maximum medical improvement with a 3% impairment rating on October 15, 2001. This preceded Robinson's first labor market survey by several months, and all of the jobs were evaluated post-MMI by Dr. Kitay. Consequently, the first survey is a valid indication of available jobs that were suitable for Claimant, notwithstanding the carpel tunnel-induced disability he sustained prior to the cervical aggravation.

The jobs listed on the first survey include chassis mechanic with Transportation Equipment Specialist at $12.00 to $13.00 per hour; janitor with

Heartland; lot attendant with Super Saver Parking at $6.50 per hour; courier with Don Taylor Associates at $7.00 per hour; gate checker/trailer inspector with Parsec at $6.00 per hour; and shipping and receiving clerk with Benner China and Glass. Dr. Kitay approved the chassis mechanic jobs with modifications; however, the record does not show whether the employer would accept the necessary modifications. In addition, Robinson, at the hearing, noted that the chassis mechanic job at Transportation Equipment and the job at Benner China and Glass may exceed Dr. Kitay's restrictions.

Claimant also notes that Robinson did not observe the janitor job for a full eight hours, and suggests, therefore, that the job may have requirements different from those Robinson specified. Claimant has, nevertheless, cited to no guiding authority which would require a vocational expert to personally observe each individual job in a labor market survey for a full eight hours to confirm that it actually entailed no duties different from those specified by the employer in its job description.[9] The job description did not require mopping or sweeping 8-hours per day; and, absent speculation about possible duties that may exceed Claimant's limitations, the evidence indicates that this job is suitable for Claimant, along with the jobs at Super Saver Parking, Don Taylor Associates, Unisource, Jaguar Tech, and several others.

In addition to the jobs listed in the first survey, Dr. Kitay approved eleven jobs on the second survey on October 18, 2004. These included, checking in cars at Avis, available March 28, 2003, at $7.20 per hour; packing fishing lures at C&H Lures available January 24, 2003 at $6.00 to $6.50 per hour; sewing machine operator at Creative Images, available September 10, 2002 at $7.00 per hour; shop clerk at Cypress Truck Lines, available June 27, 2002 at $9.00 per hour; flagman at Hubbard Construction, available February 6, 2002 at $8.00 per hour; shipping an receiving clerk at Benner China available January 17, 2002 at $8-$11.00 per hour; gate inspector at Parsec available December 7, 2001 at $6.00 per hour; dishwasher at Seminole Club available November 20, 2001 at $5.15 per hour; parts runner at Snyder Air available October 9, 2001 at $8.00 per hour; straw machine operator at Unisource, available August 1, 2001 at $9.23 per hour; dispatcher at Jaguar Tech, available at July 13, 2001 at $8.00 per hour; dispatcher at Econo-Rooter, available May 14, 2001 at $7.00 per hour; and assembler at Mercury Luggage, available February 28, 2001 at $6.25 per hour. CX 9.

[9] This is not to suggest that an additional inquiry by a vocational expert might not be warranted where, for example, the job description used is a general description found in third-party source such as the DOT. *See*, Hawkins v. SSA-Cooper, 2004 LHC 1295 at fn. 5. (ALJ Oct. 20, 2005).

Although Dr. Kitay approved the lot attendant job at Super Saver Parking and the courier position at Don Taylor Associates; Claimant notes that Robinson did not determine how far these jobs were from Claimant's home or how much expense he would incur in transportation to and from these jobs. Although the job with Florida DOT at the Florida/Georgia state line may be outside the geographic boundaries of the Jacksonville "local community," *see*, New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Kilsby v. Diamond M. Drilling Co., 6 BRBS 114(1977), aff'd. Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003(5th Cir. 1978)(jobs 65 and 200 miles away are not within the geographical area), the economic impact of commuting to other jobs within a local community is an expense every worker incurs and does not render the other jobs either unsuitable or unavailable. Objecting further, Claimant notes that courier job involved the use of Claimant's own vehicle, and Robinson did not consider the economic constraints such as increased insurance costs that would entail. Yet, economic factors, such as whether a courier job requires an applicant to use his own vehicle, and thereby increase his insurance costs, might impact the wage earning capacity reflected by such a job, but it would not render the job unsuitable or unavailable for that reason alone.

Claimant would also reject all of the jobs listed on the second labor market survey on grounds that none were subjected to a "proper vocational assessment" to determine their true vocational requirements or Claimant's ability to secure and sustain such employment. He notes that Robinson interviewed him but contends that Robinson failed to conduct any vocational testing and did not determine his eye-hand coordination or computer skills, did not determine the transportation requirements and costs associated with each job, did not determine whether vehicles Claimant would be expected to drive for some of the jobs had automatic versus manual transmissions, did not actually visit with prospective employers and failed to provide accurate job descriptions to the physicians, including the type of tools required, the amount of keyboard use required, or the weight of the equipment. Claimant also rejects opportunities provided by jobs that indicated the employer was "willing to train" arguing that his job history as a laborer likely would preclude him from obtaining work with an employer who was willing to train a job candidate.

Yet, Robinson testified that he analyzed Mathis's transferable skills and aptitudes and determined that he is capable of absorbing and learning basic computer operation training and could perform the functions necessary to work on a computer after training. He rejected as unsuitable several jobs on the surveys, including jobs requiring computer skills if the employer "preferred" someone who

had the skills. Robinson did not, however, reject computer jobs if the employer was willing to train the applicant if he believed Claimant had sufficient skill and capacity to learn to input data into a computer, and the Board has sustained jobs as suitable and available under such circumstances. Hernandez v. National Steel & Shipbuilding Co., 32 BRBS 109 (1998). Furthermore, Robinson confirmed that the jobs requiring computer use were submitted to Dr. Kitay for carpel tunnel evaluation. Those approved were, in the opinion of Dr. Kitay and Rick Robinson, therefore, suitable notwithstanding Claimant's carpel tunnel condition.

Under these circumstances, I must be guided by the Board's holding that a vocational expert's opinion is credible even if the expert did not examine the Claimant as long as the expert was, as Robinson demonstrated, aware of claimant's age, education, industrial history, and physical limitations when exploring the local opportunities. Southern v. Farmers Export Co., 17 BRBS 64 (1985); *see also*, Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979); Hogan v. Schiavone Terminal, 23 BRBS 290 (1990).

Similarly, Claimant challenges Robinson's assessment of several jobs, including the job at Avis, which entailed driving vehicles because some may have manual transmissions; and Robinson did not determine if Claimant could drive a stick-shift vehicle. Yet, Claimant has a valid driver's license and none of these job descriptions listed proficiency in operating a stick shift vehicle as a prerequisite to employment. Moreover, absent such a prerequisite, a job would not be rendered unsuitable merely because an occasional car or truck might show up on an Avis lot that Claimant was unable to drive. While larger rigs may require manual gear shifting, most small and medium sized trucks in the rental market fleet and most vehicles in the passenger rental car market operate with automatic transmissions. Thus, the ability to drive a stick shift is not an employer-imposed requirement of the job. As a result, assuming Claimant, a mechanic, lacked the aptitude quickly to master the skill of coordinating the clutch with the stick as virtually every driver prior to the early 1950's was required to learn, he probably would not be alone among Avis's young and middle aged associates or the bulk of the workforce generally. Nevertheless, a vocational expert is not required to anticipate every unusual possibility a creative attorney may envision in assessing the suitability of a job. If an Employer does not require a skill, a job is not unsuitable for a worker who lacks the skill.

Robinson testified that the suitable jobs on the first survey were available at the time they were identified. The jobs identified on the second labor market survey were available when they were identified and may have been available

before that. Under these circumstances, as previously discussed, the circuit courts have differing views on what constitutes a sufficient showing of suitable alternate employment; but the evidence before me is sufficient to conclude that Employer here has satisfied the burden imposed by every Circuit Court that has reviewed the issue. Palombo, *supra*, and Turner and consistent with Lentz, *supra,* and Diosdado, *supra,* The evidence indeed satisfies the Employer's burden whether it is required to demonstrate general categories of jobs Claimant can perform and one or two which are available, or several specific available jobs Claimant can perform. (*See*, Hayes, *supra*; Turner, *supra;* Lentz, *supra;* Moore, supra; Tann, *supra*; and Palombo, *supra*; Diosdado, *supra* and Hairston, *supra*).

The record, therefore, demonstrate that suitable alternate employment was available to Claimant at the time he reached maximum medical improvement for his carpel tunnel syndrome. Indeed, jobs such as lot attendant at Super Saver Parking available December 6, 2001 at $6.50 per hour; courier at Don Taylor associates available December 12, 2001 at $7.00 per hour; and dishwasher at Seminole Club available November 20, 2001 at $5.15 per hour were all suitable considering Claimant's age, education, experience, and physical limitations, and establish that Claimant had a wage earning capacity notwithstanding his carpel tunnel syndrome. Accordingly, Claimant's disability due to carpel tunnel syndrome is permanent and partial, and the schedule applies to the July 26, 2000, accident. Accordingly, I conclude that Claimant was properly compensated for the July 26, 2000 accident in accordance with Section 8(c)(1) of the schedule. *See*, Pepco v. Director, 449 U.S. 268, 273, 281-83 (1980); Jacksonville Shipyards v. Dugger, 587 F.2d 197 (5th Cir. 1979).

Subsequent Aggravation

The record shows that the aggravation of Claimant's generative cervical condition occurred after the July 26, 2000 accident and was a separate triggering event. Consequently, since he has suffered two distinct injuries, a scheduled injury and a non-scheduled injury arising from multiple accidents, he may be entitled to receive compensation under both the schedule and Section 8(I)(21). Frye v. Potomac Elec. Power Co., 21 BRBS 194 (1988); Green v. I.T.O. Corp. of Baltimore, 32 BRBS 67 (1998), modified, 185 F.3d 239 (4th Cir. 1999). Further, if Claimant is disabled under the Act and maximum medical improvement has not yet been reached for the new injuries, the appropriate remedy may be an award of temporary partial disability. Hoodye v. Empire/United Stevedores, 23 BRBS 341 (1990).

Average Weekly Wage
October 22, 2001 Aggravation

The Board has held that the aggravation of a previous traumatic injury constitutes a new injury and a new average weekly wage must be calculated based on wages earned immediately prior to that injury. Kooley v. Marine Industries, 22 BRBS 142 (1989); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190 (1984). Similarly, the Board has also held that medical intervention, and here by analogy the FCE, which aggravates the original job-related injury relates to that injury, but if the aggravation causes a different injury, it is treated as a new injury.[10] Since Claimant's physicians have clearly differentiated his upper extremity and neck conditions as unrelated, the aggravation of Claimant's pre-existing cervical problems constitutes a new injury, and the average weekly wage applicable to the July 26, 2000 accident is not the average weekly wage for the cervical aggravation.

Yet, the record does not show Claimant's earnings for the 52-week period prior to this new injury. For the year prior to the October 22, 2001 aggravation, the parties have not adduced actual wage data and have not otherwise proffered argument or evidence under Section 10(b) or 10(c) of the Act which might assist in calculating an average weekly wage applicable to the October 22, 2001, cervical injury. Initially, Claimant argued that his carpel tunnel syndrome was misdiagnosed and that his cervical problems emanated from a July 26, 2000 cervical accident. Claimant's theory was incorrect as this record demonstrates, but it may account for his reliance on average weekly wage data for the year prior to the July 26, 2000 injury.

Applying Section 10(c) to the Cervical Aggravation

The record shows that Claimant's carpel tunnel reached maximum medical improvement on October 15, 2001, but he ceased working on September 3, 2001, allegedly due to his carpel tunnel syndrome. The record further shows, however, that he was not totally disabled by that condition. He retained a residual wage earning capacity, as previously determined, which was reflected in the jobs

[10] For example, in a different, but an analogous, situation under section 33 (g) of the Act, in White v. Peterson Boatbuilding Co., 29 BRBS 1 (1994) a claimant, undergoing surgery for low-back injuries received during his employment, was allegedly dropped by nurses, and as a result, sustained further injuries resulting in incontinence, bowel and bladder problems, and impotency. The Board found that where compensation under the Act is sought only for disability due to the primary injury, and not for subsequent aggravations resulting from medical treatment, and the third-party settlement relates solely to the latter, Section 33 does not apply. The Board thus treated the two injuries as distinct and separable.

approved by Dr. Kitay and Robinson. In addition to the jobs at Super Saver Parking; Don Taylor Associates; and the Seminole Club that were both available and suitable, other suitable jobs included parts runner at Snyder Air available October 9, 2001 at $8.00 per hour; straw machine operator at Unisource, available August 1, 2001 at $9.23 per hour; dispatcher at Jaguar Tech, available at July 13, 2001 at $8.00 per hour; dispatcher at Econo-Rooter, available May 14, 2001 at $7.00 per hour; and assembler at Mercury Luggage, available February 28, 2001 at $6.25 per hour. Obviously, the jobs that were available before Claimant reached MMI for his carpel tunnel syndrome, can not be, and were not, considered "available" to him when his wage earning capacity following the carpel tunnel injury was evaluated previously; but his physical capacity to perform all of them, and their suitability, were evaluated by Rick Robinson and Dr. Kitay after he reached MMI for his carpel tunnel syndrome. These jobs therefore, reflect the wages Claimant was physically capable of earning before his cervical aggravation.

Wage Earning Capacity
October 22, 2001 Aggravation

Ordinarily, total disability is measured from the date of MMI to the earliest date employer establishes the availability of suitable alternate work. Palombo, *supra*; Berkstressor, *supra*; Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). In this instance, the record shows that Claimant has not reached maximum medical improvement for his cervical injuries, but neither has he worked since September 3, 2001. As in the case of the scheduled award, we proceed by noting that Claimant is unable to return to his usual employment and that the burden shifts to employer to demonstrate the existence of suitable alternate employment. The same standard applies, however, whether the claim is for permanent or temporary total disability, or temporary partial disability. Mills v. Marine Repair Serv., 21 BRBS 115 (1988), mod. on other grounds on recon., 22 BRBS 335 (1989). Even though he may not have reached maximum medical improvement for his cervical condition, the Board has held that his loss may be determined based on the difference between his pre-injury average weekly wage and his wage-earning capacity thereafter. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992). Employer may, as noted above, however, establish retroactively when suitable alternative employment existed. Tann, *supra*; Genco, Inc., *supra*. In this instance, Employer established the availability of suitable alternate employment even though MMI has not yet been reached for Claimant's cervical condition.

Suitable Alternate Employment
(Following the Cervical Aggravation)

The second labor market survey for the period February 1, 2001 to September 13, 2004, identified thirty-five jobs that Robinson initially considered suitable for Claimant and he submitted them for approval to Drs. Kitay and Hudson. The jobs Dr. Kitay evaluated in light of Claimant's bilateral carpel tunnel syndrome were evaluated in detail above. Dr. Hudson evaluated these jobs in the context of Claimant's cervical condition and approved twenty-four of them. He considered the chassis mechanic jobs unsuitable, and approved the janitor job with limitations.

Based upon the jobs approved by Rick Robinson, by Dr. Kitay for carpel tunnel, and by Dr. Hudson for the cervical aggravation, it is apparent that the aggravation of Claimant's cervical condition had no adverse impact on his wage earning capacity. Many of the same jobs that were *suitable* for Claimant considering his carpel tunnel syndrome were *available and still suitable* after he suffered the October 22, 2001 aggravation. These jobs included lot attendant job at Super Saver Parking available December 6, 2001 at $6.50 per hour; courier at Don Taylor associates available December 12, 2001 at $7.00 per hour; dishwasher at Seminole Club available November 20, 2001 at $5.15 per hour; parts runner at Snyder Air available October 9, 2001 at $8.00 per hour; straw machine operator at Unisource, available August 1, 2001 at $9.23 per hour; dispatcher at Jaguar Tech, available at July 13, 2001 at $8.00 per hour; dispatcher at Econo-Rooter, available May 14, 2001 at $7.00 per hour; and assembler at Mercury Luggage, available February 28, 2001 at $6.25 per hour; checking in cars at Avis, available March 28, 2003, at $7.20 per hour; packing fishing lures at C&H Lures available January 24, 2003 at $6.00 to $6.50 per hour; sewing machine operator at Creative Images, available September 10, 2002 at $7.00 per hour; shop clerk at Cypress Truck Lines, available June 27, 2002 at $9.00 per hour; and flagman at Hubbard Construction, available February 6, 2002 at $8.00 per hour. The record, therefore, shows that jobs ranging in pay from $5.15 per hour to $9.23 per hour were suitable for Claimant when his only disability was due to carpel tunnel syndrome, and these same jobs, including the job that paid $9.23 per hour, were found suitable for him after the cervical aggravation.

Consequently, considering the jobs Claimant was capable of performing and the wages they paid under Section 10(c), and the jobs that suitable and available

follwing the cervical aggravation and considering the wages they paid, I conclude that Claimant has failed to establish that he suffered any reduction in his wage earning capacity as a consequence of the October 22, 2001 cervical aggravation. To the contrary, based on wage earning capacity data before and after the aggravation, which is the only data available for the relevant periods in this record, Employer has demonstrated that Claimant has suffered no loss of wage earning capacity attributable to the cervical aggravation.

Diligence of Claimant's Job Search

Claimant further, however, that even if it were concluded that one or more jobs identified by the Employer turned out to be suitable, he has demonstrated through his diligent job search efforts that such employment was not available to him. Cl. Br. at 16-17. As noted above, under applicable case law, a disabled worker who diligently tries and is unable to secure work may be deemed totally disabled. Palombo, *supra*; Turner, *supra*.

The question thus focuses upon the Claimant's effort and motivation. The Second Circuit observed in Palombo: "[w]e believe that a Claimant's lack of success after diligent searching for a suitable job may be equally or even more probative of actual job availability than a vocational expert's job survey. *See*, New Orleans (Gulfwide) Stevedores v. Turner 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Trans-State Dredging v. Benefits Review Bd. (Taney), 731 F.2d 199, 201-22, 16 BRBS 74, 76 (CRT) (4th Cir. 1984), 13 BRBS 53 (1980); Royce v. Elrich Constr. Co., 17 BRBS 157, 159 n.2 (1985). Providing further guidance, the Palombo court noted that Claimant must prove that his search was a "reasonably diligent" effort to secure jobs similar to the sedentary or light duty jobs the Employer showed were reasonably available.

The record, in this instance, shows that Claimant did not look for work on his own before October 4, 2004, the date of his deposition, but did contact employers listed in the labor market surveys. The record further shows, however, that Robinson's surveys included both currently available and historically available jobs identified retroactively. Consequently, several jobs that were available when surveyed were filled by the time Claimant applied. Yet, the results remain relevant.

Claimant ceased working on September 3, 2001, and did not seek work on his own for nearly three years. His efforts under these circumstances hardly qualify as diligent. Prior to October 4, 2004, he contacted only those employers identified in Robinson's surveys, and found that several jobs were filled. Nevertheless,

suitable alternative work may be established retroactively; and the fact that a suitable job was filled by the time Claimant applied does not render it unavailable for purposes of considering whether the labor market provides the Claimant with opportunities to secure suitable alternate work. Tann, *supra*; Jones v. Genco, Inc., 21 BRBS 12 (1988).

Considering Mathis's age, education, work experience, physical condition, his general capacity to work with restrictions, the availability of jobs suitable for him, and the fact that he failed to exercise reasonable diligence in seeking work, I conclude that the Employer has satisfied its burden of establishing the availability of suitable alternate work consistent not only with Hayes, Turner, and Palombo, but the more restrictive test imposed by Lentz and Hairston. Finally, I conclude that Claimant's search for work was neither consistent over time nor reasonably diligent in nature over time within the meaning of Palombo.

Nominal Award

The record shows that Claimant's wage earning capacity remained the same both before and after the October 22, 2001 aggravation, and thus he has failed to establish any present loss of wage earning capacity due to his cervical injuries. Yet, I am mindful of the Supreme Court's decision in Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, (1997), to consider incorporating potential future losses into the current wage earning capacity determination. Thus, in Rambo II, the Court held that a worker is entitled to nominal compensation when his work related injury has not diminished his present wage earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. Under Rambo II, the employee has the burden of showing by a preponderance of the evidence that he has been injured and that the odds are significant that his wage earning capacity will fall below his pre-injury wages at some point in the future. Rambo, *supra*; *See also,* Hole v. Miami Shipyards Corp., 640 F.2d 769 (5th Cir. 1981).

The difficulty in applying Rambo II in this instance, however, is that unlike claimant, Rambo, who accepted a post-injury job, Claimant here has not worked, even on a trial basis, on any job his physicians have approved as suitable. Nevertheless, his cervical condition, at present is temporary and partial, and this was not a factor the Court in Rambo II was required to address. Yet, it is a significant consideration.

Indeed, the very nature of Claimant's current cervical condition tends to cloud any forward looking effort to anticipate what wage earning capacity he may retain in the future. What the record does show is that he has not been placed at MMI, the injury has not been rated, and that the need for specific, permanent cervical restrictions, if any, has not yet, notwithstanding the duration of the cervical treatment he has received, been evaluated by his physicians. I am mindful of a potential that the temporary job-related cervical condition may yet resolve; but I conclude, under these circumstances, that a more "significant potential" exists that his injury will diminish his future wage earning capacity. Accordingly, a nominal award seems appropriate under Rambo II.

Finally, the record shows that Claimant periodically undergoes pain management treatment for his cervical symptoms related to the October 22, 2001 aggravation. Accordingly, an award of medical benefits will be entered. *See,* Glover v. Puerto Rico Marine, 93 LHC 1397, 1398, 1797, 95 LHC 1711; BRB No. 96-1394 (May 28, 1997). Therefore;

ORDER

IT IS ORDERED that Employer pay Claimant benefits for the July 26, 2000 upper extremity injury based upon an average weekly wage of $1,115.18, for periods of temporary total disability previously paid, and benefits based upon an average weekly wage of $1,115.18 and an impairment rating of 3% permanent partial disability for the upper extremity scheduled injury; provided further however, that Employer shall be entitled to a credit for temporary total and scheduled benefits previously paid; and,

IT IS ORDERED that the claim for additional temporary total disability benefits for the July 26, 2000 injury, and/or for temporary total disability for the cervical aggravation injury be, and they hereby are, denied; and,

IT IS FURTHER ORDERED that the Employer pay to Claimant the sum $1.00 per week for temporary partial disability due to the aggravation of a pre-existing cervical condition commencing as of October 22, 2001, to date and continuing, and;

IT IS FURTHER ORDERED that the Employer furnish Claimant medical benefits for treatment of the cervical injuries associated with the October 22, 2001 cervical aggravation pursuant to Section 7 of the Act.

A

Stuart A. Levin
Administrative Law Judge